86 - 1321

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THURMAN S. ALPHIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Thurman S. Alphin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 12, 1987.

Questions Presented

1) Does F.R.C.P. 56(e) govern an IRS criminal investigator's affidavit offered as the sole support for the Government's motion for summary enforcement of a third party tax summons?

2) Is an IRS investigator's declaration that he has been assigned to investigate a taxpayer and that he issued the tax summons being challenged sufficient to demonstrate personal knowledge and competency under Federal Rule of Civil Procedure 56(e) to establish that the IRS has complied with all standards

required by the Internal Revenue Code and this Court in United States v. Powell, 379 US 48 (1964)?

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Opinion Below

The opinion of the Fourth Circuit (App. A, pp. A-1 to A-11) will be published, but have not been yet been reported. The judgment and order of the United State District Court for the District of Maryland (App. B, pp. B-1 to B-12) are unreported.

Jurisdiction

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1). The United States District Court originally had jurisdiction of this matter under 26 U.S.C. § 7609(b) and (h).

Statutory Provisions

This case involves Sections 7602 and 7609 of Title 26, the Internal Revenue Code, as amended by the Tax Equity and

Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (TEFRA), Federal Rules of Civil Procedure 56, 56(e), and 81 (a)(3). The pertinent provisions of the statutes and Federal Rules are set forth in Appendix C, infra, pp. C-1 to C-15.

Statement of the Case

The subject of this litigation is a tax summons issued under 26 U.S.C. § 7609. Anthony Pizzillo, a Special Agent for the IRS Criminal Intelligence Division, issued the summons to Robert Harrell, the accountant for the taxpayer, Thurman S. Alphin. Mr. Alphin filed a petition to quash the summons in the United States District Court for Maryland, asserting, inter alia, that the purpose of the proposed summons was to interfere with ongoing litigation between Mr. Alphin and the United States

concerning matters not related to tax enforcement.

The Government moved for summary enforcement of the summons, and for a protective order in response to Mr. Alphin's proposal to depose five employees of the Federal Aviation Administration. The motion for summary enforcement was supported by a single evidentiary document, a Declaration signed by Special Agent Anthony Pizzillo. (App. D-1 to D-5) According to Pizzillo, the purpose of the investigation was "to determine the taxpayer's correct income tax liabilities and whether he committed any offenses connected with the administration or enforcement of the internal revenue laws with respect to such income tax liabilities." (App. D-2 to D-2) Pizzillo further alleged that "the Internal Revenue Service has information

suggesting that from 1980 through 1983, the taxpayer has diverted corporate funds to his personal use and failed to report this income on the federal joint individual returns submitted by him and his wife." (App. D-5)

Pizzillo's affidavit did not indicate the source for or reliability of the alleged suggestion of diversion of corporate funds. It did not show that Pizzillo was competent to testify, or that his allegations were based on personal knowledge.

In opposition to the Government's motion, Mr. Alphin relied on his own affidavit. (App. E-1 to E-11) Mr. Alphin attested that he had always reported his income and paid his taxes in full, and that he had no knowledge of any illegal conduct on his part to warrant the investigation. In order to ensure

accuracy in his business practices, he employed Mr. Harrell for bookkeeping and tax preparation. (App. E-1 to E-2)

Mr. Alphin additionally attested that since 1980, he had been involved in litigation with the United States. This litigation included an unsuccessful administrative action by the Federal Aviation Administration to suspend his aviation mechanic's license (App. E-2 to E-3), two unsuccessful lawsuits by the United States to recover civil penalties from Mr. Alphin and his family-owned corporation (App. E-6 to E-7), and a pending action by Mr. Alphin against the Federal Aviation Administration for damages under the Privacy Act. (App. E-5 to E-6)

Finally, Mr. Alphin attested that neither he nor his company had been civilly audited for the years under

investigation by the Criminal Investigation Division. He concluded that he believed the sole purpose of the IRS in seeking the summoned material was to distract his attention and corporate attention from his litigation with the Federal Aviation Administration, and to assist that agency in a campaign of harassment to his assets and reputation. (App. E-10 to E-11)

The district court granted the Government's motion for summary enforcement of the summons, subject to an in camera review of summonsed documents for privileged work product in connection with the Federal Aviation Administration litigation. (App. B-1 to B-12)

On appeal to the Court of Appeals for the Fourth Circuit, Mr. Alphin made two arguments. First he argued that he had set forth sufficient specific facts

from which the court could infer the possibility of an illegal purpose by the Government in issuing the summons, and therefore he was entitled to an evidentiary hearing and limited discovery. Second, he argued that the IRS should not obtain summary enforcement of a tax summons under Federal Rule of Civil Procedure where the IRS's only evidence was a statement by a special agent not in compliance with the requirements of Federal Rule 56(e).

The Court of Appeals affirmed the decision to summarily enforce the summons, holding that Mr. Alphin's affidavit did not set forth specific facts from which the court could infer the possibility of wrongful conduct by the IRS. The court also held that the application of Rule 56 in tax summons cases had been reasonably limited by cases holding that

an affidavit averring the Powell good faith standards is sufficient to establish the government's prima facie case. Additionally, the Court found that Pizzillo's declaration was adequate to satisfy the requirement under Rule 56(e) that an affidavit be made on personal knowledge by an affiant competent to testify to matters stated therein.

Reasons for Granting the Writ

1) The Fourth Circuit's Decision is in Conflict With Procedures Established by This Court and by Congress to Insure Against Abuse by the IRS in the Exercise of Its Summons Authority

Certain standards must be met in order to enforce any tax summons. These standards have been outlined by the Supreme Court in United States v. Powell, 379 US 48 (1964). To establish a prima facie case for enforcement of a tax summons, the Government must show that it

has in good faith complied with four separate requirements: 1) The investigation must be conducted for a legitimate purpose; 2) The inquiry must be relevant to that purpose; 3) The information sought must not already be in the Internal Revenue Service's possession; and 4) The administrative steps required by the tax code must have been followed. These requirements are not exclusive by any means. The court may impose other requirements to prevent an abuse of its process. See United States v. LaSalle National Bank, 437 US 298 (1978).

Under the first Powell standard, an investigation by the Internal Revenue Service must be conducted in accordance with the purposes outlined in 26 U.S.C. § 7602. Although Powell rejected imposing a standard of probable cause on the IRS, it established the taxpayer's right to

challenge the IRS at an adversary hearing:

> Reading the statutes as we do, the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons, either before or after the three-year statute of limitations on ordinary tax liabilities has expired. He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed--in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect. This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he "may challenge the summons on any appropriate ground," Reisman v. Caplin, 375 U.S. 440, at 449, 84 S. Ct. at 513. Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued

> for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.
> Id. at 57 - 58.

In Powell, the Court rejected the taxpayer's argument that the IRS was required to show probable cause before it could issue its tax summons, reasoning that the summons was administrative in nature, and not part of a judicial criminal proceeding. Until the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982), the courts would refuse to enforce a summons which was issued for the purpose of a criminal investigation, since such an investigation was considered an improper purpose under Powell.

Hence, it was essential that Congress preserve the protections guaranteed the taxpayer by Powell, including

entitlement to an adversary hearing, when TEFRA broadened the scope of 26 U.S.C. § 7602 to permit IRS's summons authority to be used for criminal as well as civil tax investigations. See 26 U.S.C. § 7602(b). And in fact, the legislative history for TEFRA manifests Congress's intent that the Powell protections, including the procedural burdens imposed on the IRS, remain:

> "Although an action to quash the summons must be instituted by the taxpayer, the ultimate burden of persuasion with respect to its right to enforcement of the summons will remain on the Secretary, as under current law. Thus, the Secretary will have to meet all the requirements of the United States v. Powell, 379 U.S. 48 (1964), including a showing that the individual investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that all the administrative steps required by the Code have been followed." [Underlining added.]
> Senate Report, P.L. 97-248, 1982 U.S. Code Cong. & Admin. News, p. 1029.

The Fourth Circuit's decision in this case, however, has transformed the requirement of a "hearing" and a "showing" into a boiler plate recitation of Powell by a special agent who is not shown to have any knowledge of the background of the investigation, or purpose of the summons. The taxpayer, already in the dark as to the basis of a criminal investigation, will have no means of confronting his accuser; no way of ascertaining the good faith of the IRS; and no realistic avenue for preventing an unwarranted violation of his private affairs and good name. Besides contradicting the instructions of this Court and Congress, the Fourth Circuit's erosion of judicial and legislative procedures substantially alters the careful balance struck by Powell between the Government's need for information

relevant to the collection of taxes, and the citizen's protection from possible abuse of the IRS's far-reaching powers.

2) The Decision Below Is Contrary to the Federal Rules of Civil Procedure

This Court in Powell expressly noted that the Federal Rules of Civil Procedure apply to the procedures governing tax summons. U.S. v. Powell, supra, 379 U.S. at 58, fn. 18. Moreover, Federal Rule 81(a)(3) provides that:

> "These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

In order to obtain summary judgment, a movant must meet the evidentiary requirements contained in Federal Rule of Civil Procedure 56. In a concurring

opinion to a recent Supreme Court decision concerning Rule 56, Justice White stated:

> "But the movant must discharge the burden the rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."
> Celotex Corp. v. Catrett, 477 U.S. ___, 106 S. Ct. 2548, 2555 (1986)

Also see dissent ("The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment"). Id. at 2557.

An unsupported restatement of the Powell requirements by an IRS agent with an unknown involvement in the investigation is not such a prima facie showing. Rule 56(e) requires that any affidavit in support of a summary judgment motion "shall be made on personal knowledge,

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Agent Pizzillo's allegation that "The purposes of the investigation are, for the years under investigation, to determine the taxpayer's correct income tax liabilities and whether he committed any offenses connected with the administration or enforcement of the internal revenue laws with respect to such income tax liabilities" is only a conclusory summarization of the Government's authority under 26 U.S.C. § 7602, and is unsupported by any facts made on personal knowledge. Although Agent Pizzillo states that he was assigned to "investigate the federal income tax liabilities of Thurman S. Alphin," he provides no

information as to the history or depth of his involvement in the case. Indeed, Paragraph 9 of Mr. Pizzillo's declaration, in which he repeats the hearsay that the Internal Revenue Service has information suggesting a diversion of corporate funds, irdicates a lack of personal knowledge.

In its arguments to the court below, the IRS glossed over these defects, arguing that the court should uncritically accept the Government's declarations of good faith, and dismissing the possibility of abuse as "nonsense." (Government Brief 15) Both Congress and this Honorable Court have already rejected these arguments by requiring the IRS to demonstrate adherence to the Powell standards before a court is to enforce a tax summons. United States v. Powell, 379 U.S. 48 (1964).

The decision below overlooked this conflict with statute and precedent, holding that Rule 56 has "reasonably been limited by cases holding that an affidavit averring the Powell good faith elements is sufficient to establish the Government's prima facie case. See, e.g., Kis, 658 F. 2d at 536; Garden State National Bank, 607 F. 2d at 68." (App. A-6)

But neither Kis nor Garden State National Bank ruled that the IRS could dispense with the requirements of Federal Rule 56 in its affidavits to demonstrate compliance with Powell. Indeed, the record in U.S. v. Garden State National Bank, 607 F. 2d 61 (3rd Cir., 1979) included two evidentiary hearings as well as affidavits by investigators. Id. at 65, 72, n. 16.

In short, this decision, for the first time, permits the IRS to avoid the

procedures that govern other litigants, including the taxpayer in this case. The IRS claims such an evasion of established procedure is desirable because of the importance of tax collection. But equally important should be the rights of individual citizens to know that their government is not abusing its authority to conduct an unjustified campaign of economic harassment. The Federal Rules strike a balance in other types of litigation which are as important as tax summonses, and provide a fair and impartial framework for adjudicating tax summons petitions that should not be casually ignored.

3) Confusion Exists Among the Circuit Courts of Appeals As to the Taxpayer's Entitlement to An Evidentiary Hearing Under 26 U.S.C. § 7609

The circuit courts of appeals have failed to implement a uniform standard in determining the taxpayer's entitlement to an evidentiary hearing under 26 U.S.C. § 7609. The Third and Tenth Circuits have ruled that the taxpayer must produce sufficient evidence under Rule 56(c) to establish his defense before he will be permitted a hearing. See United States v. Balanced Financial Management, 769 F. 2d 1440, 1444 (10th Cir., 1985); United States v. Garden State National Bank, 607 F. 2d 61, 71 (3d Cir., 1979).

On the other hand, the Fifth and Eleventh Circuits have held that a mere allegation of improper purpose automatically entitles the taxpayer to an evidentiary hearing. United States v. Radue,

707 F. 2d 493 (11th Cir., 1983); United States v. Southeast First National Bank, 655 F. 2d 661, 667 (5th Cir., 1981). The Ninth Circuit has a similar standard entitling the taxpayer to a hearing provided he alleges specific facts from which a possibility of wrongful conduct by the Government may be inferred. United States v. Samuels, Kramer and Company, 712 F. 2d 1342, 1348 (9th Cir., 1983).

The Second and Seventh Circuits have articulated a middle ground. United States v. Millman, 765 F. 2d 27 (2d Cir., 1985); United States v. Kis, 658 F. 2d 526, 540 (7th Cir., 1981). This standard permits the taxpayer to rebut the Government's prima facie case by submitting specific facts in accordance with Rule 56 from which a court might infer the possibility of wrongful conduct. If the

taxpayer does submit such facts, he is entitled to an evidentiary hearing to test the Government's underlying purpose. Id.

The decision below appears at face to adopt this middle ground. But the court made a finding that the facts asserted by Mr. Alphin "do not support an inference that the investigation was possibly intended to harass Alphin or to force him to settle the suit with the FAA." (App. A-8)

The obstacle before Mr. Alphin in proving his assertion of bad faith is that such proof can usually only be established through an examination of the IRS investigators who have recommended the issuance of the summons. This problem is precisely why the Fifth and Eleventh Circuits have guaranteed the taxpayer a hearing based on his assertion

of bad faith, in spite of the IRS's claims to the contrary. Also see Donaldson v. United States, 400 U.S. 517, 529 (1971) (Summary enforcement proceeding appropriate so long as rights of summoned party are protected and an adversary hearing, if requested, is made available).

The Tenth and Third Circuits ignore the problem by imposing the burden on the taxpayer to produce evidence of bad faith in accordance with Rule 56. While this makes sense in view of the taxpayer's burden of proof once the IRS established compliance with the Powell criteria, Powell assumed that the taxpayer would have a right to confront his accusers at an open hearing.

In this case, the court only considered the taxpayer's allegations of fact as opposed to opinion or conclusion. But

it rejected using the same standard to weigh the IRS's evidence in support of summary enforcement, instead ruling that Rule 56 does not apply to the IRS. (App. A-9 to A-10) The confusion among the circuits as to the taxpayer's right to a hearing could be easily ended simply by applying Rule 56 to both sides. Thus, the IRS could still obtain summary enforcement of a tax summons so long as it supported its cause with an affidavit made on personal knowledge, setting forth such facts as would be admissible in evidence. Although the taxpayer would not have an opportunity to cross-examine the investigator if the IRS provided such an affidavit, he would at least have the assurance that the affidavit has been sworn to by an official with personal and direct knowledge. And this procedure would ensure consistency with Federal

Rule 56, and end the conflict in procedures among the circuits.

Conclusion

For the reasons set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1119

Thurman S. Alphin and Mary L. Alphin;
Alphin Aircraft, Inc.
Appellant,

versus

United States of America,
Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge. (CA-84-4538-HM)

Argued: November 10, 1986
Decided: January 12, 1987

Before WINTER, Chief Judge, BUTZNER, Senior Circuit Judge, and JAMES B. MCMILLAN, United States District Judge for the Western District of North Carolina, sitting by designation.

Paul Victor Jorgensen (G. Nelson Mackey, Jr., on brief) for Appellant; Joan Iris Oppenheimer, Tax Division, Department of Justice (Roger M. Olsen, Assistant Attorney General; Michael L. Paup; Charles E. Brookhart on brief) for Appellee.

BUTZNER, Senior Circuit Judge:

Thurman S. Alphin appeals the judgment of the district court granting summary enforcement of a tax summons against his accountant. We affirm.

Internal Revenue Service agent Anthony Pizzillo issued an administrative summons to Mr. Alphin's accountant on November 27, 1984. On December 17, 1984, Alphin filed a petition in district court pursuant to 26 U.S.C. § 7609(b)(2) to quash the summons. Thereafter the government moved for summary denial of the petition to quash and for summary enforcement of the summons. The court granted the government's motion on April 10, 1986.

Alphin contends in this appeal that he is entitled to an evidentiary hearing and to limited discovery on the issue of enforcement of the third-party tax

summons. He asserts as his ground for this hearing that the IRS issued summons for the purpose of interfering with ongoing and unrelated litigation between Alphin and the Federal Aviation Administration and not to conduct a legitimate tax investigation.

The Internal Revenue Code empowers the IRS to investigate taxpayers to determine the correctness of their returns or any tax liability. 26 U.S.C. § 7602. To this end, the Secretary or his delegate is authorized to examine "any books, papers, records, or other data which may be relevant or material to such inquiry." 26 U.S.C. § 7602(a)(1). He may also issue a summons to third-party record keepers according to the procedures outlined in 26 U.S.C. § 7609. This power, however, is limited to the purposes established in § 7602. It may not be used for improper purposes, "such as to

harass the taxpayer or to put pressure on him to settle a collateral dispute." United States v. Powell, 379 U.S. 48, 58 (1965).

In order to show that its summons authority is being used in good faith pursuit of these purposes, the government, when seeking enforcement of a summons, must show: 1) the investigation is being conducted for a legitimate purpose; 2) the inquiry is relevant to that purpose; 3) the information sought is not already in the possession of the IRS; and 4) the administrative steps required by the Code have been followed. Powell, 379 U.S. at 57-58.

The government may establish its prima facie case by an affidavit of an agent involved in the investigation averring the Powell good faith elements. United States v. Kis, 658 F. 2d 526, 536 (7th Cir. 1981); United States v. Garden State

National Bank, 607 F. 2d 61, 68 (3d Cir. 1979). No probable cause standard need be met. Powell, 379 U.S. at 56-57. The government's burden is fairly slight because this is a summary proceeding. It occurs only at the investigative stage of an action against the taxpayer, and "the statute must be read broadly in order to ensure that the enforcement process of the IRS are not unduly restricted." Kis, 658 F. 2d at 536.

Once the government has made its prima facie case, the burden shifts to the party challenging the summons to show that enforcement would be an abuse of the court's process. The party challenging the summons bears the heavy burden of disproving the actual existence of a valid civil tax determination or collection purpose. United States v. Lasalle National Bank, 437 U.S. 298, 316 (1978).

Although an evidentiary hearing may be needed for the taxpayer to meet this burden, the right to a hearing is not absolute. United States v. Harris, 628 F. 2d 875, 879 (5th Cir. 1980). In order to be entitled to a hearing, the party challenging the summons must allege specific facts in its responsive pleadings, supported by affidavits, from which the court can infer a possibility of some wrongful conduct by the IRS. Kis, 658 F. 2d at 540; Garden State National Bank, 607 F. 2d at 71. See also United States v. Equitable, 611 F. 2d 492, 499-501 (4th Cir. 1979) (hearing required when party states with sufficient particularity factual support for its allegations of bad faith). "Mere allegations of bad faith will not suffice." Kis, 658 F. 2d at 539. But see United States v. Southeast First National Bank of Miami Springs, 655 F. 2d 661, 667 (5th Cir.

1981) (allegation of improper purpose sufficient to trigger limited hearing). If the challenging party cannot refute the government's prima facie case or cannot factually support a proper affirmative defense, "the district court should dispose of the proceeding on the papers before it and without an evidentiary hearing." Garden State National Bank, 607 F. 2d at 71. Similarly, the court should not allow discovery at this stage unless the taxpayer makes a preliminary demonstration of abuse. United States v. Will, 671 F. 2d 963, 968 (6th Cir. 1982).

In evaluating Alphin's contention we find that he did not allege facts sufficient to support an inference by the district court that the IRS was acting with an improper purpose in issuing the summons. Alphin has merely alleged that the summons was issued for the sole

purpose of distracting his attention from the ongoing unrelated litigation with the FAA and of bolstering "the campaign of harassment" to his assets and reputation by the FAA.

In support of his contention Alphin filed an affidavit describing in detail the history of his litigation with the government. He asserts the following facts as supporting an inference of harassment by the IRS: 1) five months before issuance of the summons the government initiated suits against Alphin and Alphin Aircraft, Inc.; 2) the cutoff date for discovery in Alphin's earlier suit against the FAA was scheduled for just 19 days after the summons was issued. These facts do not support an inference that the investigation was possibly intended to harass Alphin or to force him to settle the suit with the FAA. Furthermore, the harassment theory

is undercut by Alphin's subsequent allegation that the IRS investigation was initiated by someone who had a personal grudge against an Alphin Aircraft officer. Alphin offered no factual support for this allegation.

Alphin also contends that the government is not entitled to summary enforcement of the summons because the affidavit of agent Pizzillo does not comply with Federal Rule of Civil Procedure 56(e).

The Federal Rules of Civil Procedure are generally applicable to proceedings such as a summons enforcement proceeding, unless otherwise provided by statute, or by the court pursuant to local rule or court order. Fed. R. Civ. P. 81(a)(3). Courts may limit their application when to apply them literally would impair the summary nature of the proceeding. See 7 J. Moore, Federal Practice ¶ 81.06(1). Thus, even if Rule 56, which by its terms

applies to summary judgments, is applicable, its application has reasonably been limited by cases holding that an affidavit averring the Powell good faith elements is sufficient to establish the government's prima facie case. See, e.g., Kis, 658 F. 2d at 536; Garden State National Bank, 607 F. 2d at 68.

Agent Pizzillo's affidavit discloses that as a matter of law the government has established a prima facie case. We have also concluded that as a matter of law Alphin's response is insufficient to rebut the government's case. Agent Pizzillo's case. Agent Pizzillo's declaration establishes that he is the agent assigned to the case and that he issued the summons. This satisfies the rule's concern that an affidavit be made on personal knowledge and that the affiant be competent to testify to matters stated therein. Rule 56, there-

fore, does not foreclose summary enforcement of the summons.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM84-4538

MARY L. ALPHIN, THURMAN S. ALPHIN, and
ALPHIN AIRCRAFT, INC.

v.

UNITED STATES OF AMERICA

Memorandum

Filed: April 10, 1986

MEMORANDUM

Presently pending before this court is the petition of Thurman Alphin, Mary Alphin and Alphin Aircraft, Inc. ("Petitioners"), filed pursuant to 26 U.S.C. § 7609(b), to quash an Internal Revenue Service ("IRS") summons and the cross motion of the United States for summary denial of petition to quash and for summary enforcement of the summons under 26 U.S.C. § 7609(h). In addition, the United States has filed a motion for a protective order in response to Petitioners' notice to take the depositions of five employees of the Federal Aviation Administration ("FAA").

Judge Kaufman of this court recently articulated the standard to be applied in assessing whether the government has established a prima facie case for enforcement. See Uhrig v. United States

592 F. Supp. 349, 352 (D.Md. 1984). Specifically, the government must show: "(1) the investigation is being conducted for a legitimate purpose; (2) the information sought is relevant to that purpose; (3) the information is not already in the possession of the IRS; and (4) the administrative steps required by the Internal Revenue Code have been followed." Judge Kaufman also noted that "the requisite showing is generally made by affidavit of the agent who issued the summons and who is seeking enforcement." Id.

In the instant case, the government has filed the declaration of IRS Special Agent Anthony Pizzillo. The court believes that the agent's declaration establishes all of the requisite elements for a prima facie case for enforcement. In particular, the Special Agent states that the purpose of the investigation is

to determine the taxpayer's correct income tax liabilities, and whether he committed any offenses connected with the administration or enforcement of the internal revenue laws. (See Paragraph 3 of Declaration). In paragraph 9 of his declaration, Special Agent Pizzillo further states that the IRS has information suggesting that from 1980 through 1983, the taxpayer diverted corporate funds to his personal use and failed to report this income on his individual federal joint returns. This is clearly a legitimate purpose for issuing the summons, as the IRS has a positive duty to investigate and audit persons who may be liable for taxes. United States v. Bisceglis, 420 U.S. 141 (1975). This investigative authority need not be based on probable cause that the revenue laws are being violated; the IRS may investigate merely on suspicion that the law is

being violated. United States v. Powell, 379 U.S. 48 (1964).

The government having established a prima facie case for enforcement, the burden then shifts to petitioners to "disprove the existence of a valid purpose or to show that enforcement of the summonses would be an abuse of the court's process or otherwise would be improper." Uhrig at 352. The court believes that petitioners have failed to sustain their burden in the instant case.

The petitioners allege that the summons was issued in bad faith. In order to make an adequate showing of bad faith, the petitioner must introduce substantial evidence to rebut the United States' prima facie case. United States v. LaSalle National Bank, 437 U.S. 298 (1978). In their affidavit submitted in support of the petition to quash the summons the petitioner Thurman Alphin

alleges that the sole purpose of the summons is to harass him, and to distract his attention from various lawsuits between him and the United States. However, he offers no evidence beyond conclusory allegations, and these are not sufficient to rebut the government's prima facie showing. In addition, in petitioners' response to the governments's motion for summary denial of petition to quash, the petitioners state that, since the filing of the petition, they have learned that the summons and investigation were initiated on information provided by an individual who had a personal grudge against one of the officers of Alphin Aircraft. (See Paragraph 5 of Response). This contention undercuts the petitioners' claim that the investigation was prompted by the government (and the FAA in particu-

lar) to harass the petitioners for their lawsuits.

For the foregoing reasons, the court believes the petitioners have failed to adduce sufficient facts or affidavits setting forth specific facts to rebut the government's prima facie showing that enforcement of the summons is, for the most part, proper. However, the petitioners also contend that the summons is overly broad, and may possibly include documents and matter which were prepared by or for petitioners' attorney in preparation for litigation.

In his affidavit, Mr. Alphin states that he "employed a certified public accountant to assist in the bookkeeping and tax preparation". The government argues that this indicates that the CPA's records were not prepared in anticipation of litigation, but rather were prepared in the "ordinary course of business."

The court finds that the government reads too much into this statement of Mr. Alphin's. Although Mr. Alphin's statement indicates that he hired a CPA to prepare records that would be considered "general business records", that does not exclude the possibility that the CPA might have also prepared some items directly for use in litigation. In fact, Paul Jorgensen, counsel for petitioners, states in his affidavit in support of the petition to quash that he represents petitioners in their lawsuits with the government, and that pursuant to that representation, he has asked Mr. Harrell, the summonsed party, to prepare documents for him to use in litigation. Although it appears to the court that the majority of the documents and materials sought by the summons will not be privileged, the court will conduct an in camera review of

those materials which the petitioner contends are privileged.

Finally, the government has filed a motion for a protective order concerning the depositions of five FAA employees that the petitioners have noted. Because the court finds that the summons is proper and should be enforced, there are no grounds for the petitioners to take the depositions, and therefore the court will grant the motion for protective order. The court will enter a separate order embodying the rulings of this memorandum.

Dated: April 10th, 1986

/s/ Herbert F. Murray
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM84-4538

MARY L. ALPHIN, THURMAN S. ALPHIN, and
ALPHIN AIRCRAFT, INC.

v.

UNITED STATES OF AMERICA

Order

Filed: April 10, 1986

ORDER

Upon motion of the United States for summary enforcement of the summons issued to HARRELL AND RANDALL, CPA on November 27, 1984, it appearing that the motion should be granted in part, it is this 10th day of April 1986, by the United States District Court for the District of Maryland,

ORDERED:

(1) that within fifteen (15) days from the date of this Order, the petitioners submit to the court for in camera review those documents and materials otherwise subject to the summons which the petitioners contend are privileged as work-product in connection with litigation;

(2) that with the exception of those documents presented to the court for in camera review, as provided in (1) above,

that the aforesaid summons be enforced

and that the summoned party appear at a reasonable place and time to be set by the Internal Revenue Service;

(3) that the stay effected by the filing of the instant petition pursuant to 26 U.S.C. § 7609(d)(2) is hereby dissolved and lifted;

(4) that the petition to quash the third-party recordkeeper summons is hereby denied with prejudice;

(5) that the motion for a protective order filed by the United States is hereby Granted;

(6) that the Clerk of the Court shall forward a certified copy of this Order to the summoned party as follows:

Harrell and Randall, CPA
1060 Crestwood Drive
Hagerstown, MD 21740

(7) that the Clerk of the Court shall mail a copy of this Order and the accompanying Memorandum to the parties.

/s/ Herbert F. Murray
United States District Judge

APPENDIX C

§ 7602. Examination of books and witnesses.

(a) Authority to summon, etc. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the cat, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. The purposes for which the Secretary may take any action described

in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral.

(1) Limitation of authority. No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect. For purposes of this subsection--

(A) In general. A Justice Department referral is in effect with respect to any person if--

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination. A Justice Department referral shall cease to be in effect with respect to a person when--

(i) the Attorney General notifies the Secretary, in writing, that--

(I) he will not prosecute such person for any offense connected

with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately. For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(As amended Sept. 3, 1982, P.L. 97-248, Title III, Subtitle D, § 333(a), 96 Stat. 622.)

§ 7609. Special procedures for third-party summonses.

(a) Notice.

(1) In general. If--

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such

person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined. For purposes of this subsection, the term "third-party recordkeeper" means--

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A);

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f) [15 USCS § 1681a(f)]);

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4) [15 USCS § 78c(a)(4)];

(E) any attorney;

(F) any accountant; and

(G) any barter exchange (as defined in section 6045(c)(3)).

(4) Exceptions. Paragraph (1) shall not apply to any summons--

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) Nature of summons. Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash.

(1) Intervention. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash.

(A) In general. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the

Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc. Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies.

(1) In general. Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(f)(2), or 6427(i)(2) and requires the production of records.

(2) Exceptions. A summons shall not be treated as described in this subsection if--

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A), or

(B) it is in aid of the collection of--

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) Records; certain related testimony. For purposes of this section--

(A) the term "records" includes books, papers, other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

(d) Restriction on examination of records. No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made--

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of the subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of statute of limitations. If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitation under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(f) Additional requirement in the case of a John Doe summons. Any summons described in subsection (c) which does

not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that--

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. In the case of any summons described in subsection (c), the provisions of subsections (a)(1) and (b) shall not apply if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc.

(1) Jurisdiction. The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f),

or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsection (f) and (g). The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

[(3) Repealed]

(i) Duty of third-party recordkeeper.

(1) Recordkeeper must assemble records and be prepared to produce records. On receipt of a summons described in subsection (c), the third-party recordkeeper shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give recordkeeper certificate. The Secretary may issue a certificate to the third-party recordkeeper that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for recordkeeper who discloses. Any third-party recordkeeper, or agent or employee thereof, making a disclosure of records pursuant to this section in good-faith reliance on the certificate of the Secretary or an order of a court requiring production of records shall not be liable to any customer or other person for such disclosure.

(As amended Apr. 2, 1980, P.L. 96-223, Title II, Part III, § 232(d)(4)(E), 94 Stat. 278; Sept. 3, 1982, P.L. 97-248, Title III, Subtitle B, Part I, § 311(b), Subtitle D, §§ 331(a)-(d), 332(a), 96 Stat. 601, 620, 621; Jan. 6, 1983, P.L. 97-424, Title V, Subtitle B, § 515 (b)(12) in part, 96 Stat. 2182; July 18, 1984, P.L. 98-369, Division A, Title VII, Subtitle A, § 714(i), Title IX, Subtitle B, § 911(d)(2)(G), 98 Stat. 962, 1007; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(28)(D), 98 Stat. 3359.)

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule

judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts

showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

RULE 81. Applicability in General

(a) To What Proceedings Applicable.

* * * * * *

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

* * * * * *

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 1951, eff. Aug. 1, 1951; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

APPENDIX D
DECLARATION

ANTHONY PIZZILLO, being of legal age and pursuant to the provisions of 28 U.S.C., Section 1746(2), deposes and says as follows:

1. I am a duly commissioned Special Agent of the Criminal Investigation Division of the Internal Revenue Service with post of duty at Baltimore, Maryland, and performing my duties under the District Director of Internal Revenue, Baltimore, Maryland.

2. In my capacity as a special agent, I was assigned to investigate the federal income tax liabilities of Thurman S. Alphin (hereinafter "taxpayer") for the years 1980, 1981, 1982 and 1983.

3. The purposes of the investigation are, for the years under investigation, to determine the taxpayer's correct income tax liabilities and whether he

committed any offenses connected with the administration or enforcement of the internal revenue laws with respect to such income tax liabilities.

4. As of the date of this declaration, with respect to the taxes and periods under investigation, no recommendation has been made to the Department of Justice for a grand jury investigation of, or the criminal prosecution of, the taxpayer. Moreover, the Department of Justice has not made any request under Internal Revenue Code of 1954, Section 6103(h)(3)(B) (26 U.S.C.) for the disclosure of any return or return information (as such terms are defined in Internal Revenue Code of 1954, Section 6103(b) (26 U.S.C.)) relating to the taxes and periods under investigation.

5. I issued the summons attached hereto as Exhibit 1 to "Harrell and

Randall, CPA," as indicated thereon ("the summoned party") on the date indicated on the summons and the summons was served by Special Agent Robin Lord as indicated by the certificate of service to the summons. The summoned party transacted business with the taxpayer and is in possession of records and other information relating to the matters under investigation.

6. The summons was issued to Harrell and Randall, CPA, because R. L. Harrell signed as preparer of the taxpayer's federal individual income tax returns, filed jointly with the taxpayer's wife, Mary Alphin, as well as the preparer of the federal corporate income tax returns of Alphin Aircraft, Inc., a closely held corporation operated by the taxpayer and his family. Beneath R. L. Harrell's signature on the tax returns was stamped

"Harrell and Randall, Certified Public Accountants." Furthermore, the summoned party advertises under the name "Harrell and Randall, Certified Public Accountants" in the telephone directory for the Hagerstown, Maryland area, the Washington County telephone directory. Additionally, as certified in the certificate of service to the summons, Special Agent Robin Lord personally served a copy of the summons to R. L. Harrell, CPA.

7. Notice of issuance of the summons was given as required by 26 U.S.C., Section 7609(a) by certified mail. All procedures required by the Internal Revenue Code of 1954, as amended, were followed with respect to the summons.

8. The testimony and the books, records, papers and other data demanded by the summons are not already in the possession of the Internal Revenue Service.

9. The testimony and the books, records, papers and other data demanded by the summons are relevant and necessary to the purposes of the investigation in that they may shed light on the correct income tax liabilities of the taxpayer for the years under investigation. In this regard, the Internal Revenue Service has information suggesting that from 1980 through 1983, the taxpayer has diverted corporate funds to his personal use and failed to report this income on the federal joint individual income returns submitted by him and his wife.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of February, 1985.

/s/ ANTHONY PIZZILLO
Special Agent
Criminal Investigation Division
Internal Revenue Service
Baltimore, Maryland

APPENDIX E

AFFIDAVIT OF THURMAN S. ALPHIN IN SUPPORT OF PETITION TO QUASH

I, Thurman S. Alphin, being of legal age, depose and say as follows:

1. I am the taxpayer named in the summonses issued by Special Agent Anthony Pizzillo and I received notice of their issuance by certified mail.

2. I have been the majority shareholder of Alphin Aircraft, Inc., a close corporation dedicated to the repair, maintenance, and rebuilding of airplanes, which I founded in 1974 after operating a sole proprietorship repairing airplanes for thirty years.

3. To the best of my knowledge, information, and belief, Alphin Aircraft has always reported its income and I have always reported my income to the Internal Revenue Service, and we have always paid full and proper taxes. Because of the complexity of the accounting and

bookkeeping tasks required in a small business today, I have employed a Certified Public Accountant to assist in the bookkeeping and tax preparation for the company and my wife and I personally for many years. To the best of my knowledge, information, and belief, all books and corporate and individual returns have been completed fully accurately.

4. I am now 68 years old and have reduced my role in the day to day management of Alphin Aircraft, Inc. Unfortunately, for the past 5 years both Alphin Aircraft and I have been involved in litigation with the United States of America due to regulatory activities of the Federal Aviation Administration, and this litigation has consumed most of my time, attention and energy.

5. In August 1980, the Federal Aviation Administration initiated an

administrative proceeding seeking to suspend my personal Inspection Authorization license for sixty days, based on my signing off on the overhauls and returning to service two engines owned by Tri-State Airways, Inc., a company located at Kupper Airport in New Jersey. Following a hearing, an Administrative Law Judge affirmed the Federal Aviation Administration's decision to suspend my license, but reduced the time to 45 days. I appealed that decision to the National Transportation Safety Board.

6. While the National Transportation Safety Board appeal was pending, Tri-State Airways, Inc. sued Alphin Aircraft, Inc. in a New Jersey state court for damages based on the overhauls performed by Alphin Aircraft, Inc. The principal Federal Aviation Administration investigator who testified against Alphin

at the National Transportation Safety Board hearing also testified at the state court trial on behalf of Tri-State Airways, Inc. as its chief witness. In spite of his testimony the state court judge issued a decision finding in favor of Alphin Aircraft, Inc.

7. Because of inconsistencies between the testimony the Federal Aviation Administration investigator gave before the Administrative Law Judge and at the New Jersey state court case, the National Transportation Safety Board remanded the case for further evidentiary and other proceedings. The same Administrative Law Judge issued a new decision affirming his original order. I again appealed to the National Transportation Safety Board reversed the Administrative Law Judge's Order of Suspension, finding insufficient evidence to support the charges against

me, and dismissed these charges. A Motion for Reconsideration filed by the Federal Aviation Administration on July 18, 1984 is presently pending before the National Transportation Safety Board. Administrator v. T. S. Alphin, NTSB Docket No. SE4824.

8. In March of 1982 I filed an action in the U. S. District Court for Maryland against J. Lynn Helms, then Administrator of the Federal Aviation Administration, three Federal Aviation Administration inspectors, and several private parties. In the pleading, I asserted that the three Federal Aviation Administration inspectors and others had conspired to illegally create and release false investigational reports in order to damage the reputation and good of myself and my business. See Alphin, et al. v. FAA, et al., Civil Action No. HAR-82-558.

9. Following extensive filings and a referral to Magistrate Daniel Klein for resolution of all outstanding motions, on April 24, 1984 Magistrate Klein issued a Report and Recommendation recommending dismissal of the individual claims against the three Federal Aviation Administration inspectors on jurisdictional grounds. Magistrate Klein also recommended that our Motion to Amend the Complaint to assert a Privacy Act claim against the Federal Aviation Administration be granted. On May 24, 1984 Judge Hargrove adopted in toto Magistrate Klein's recommendation.

10. On June 4, 1984, more than four years after the Federal Aviation Administration had initiated its suspension proceedings against me, but immediately before the National Transportation Safety Board dismissed these charges, and more

than two years after I had filed my Privacy Act litigation against the Federal Aviation Administration, the United States of America filed a lawsuit in the U. S. District Court of Maryland seeking a civil penalty of $2,000 against me, and a separate lawsuit seeking a civil penalty of $8,000 against Alphin Aircraft, Inc. These two actions alleged that the company and I violated certain Federal Aviation Administration regulations more than four and five years ago. (See United States of America v. Alphin Aircraft, Inc., Civil Action No. K-84-2287; United States of America v. Thurman S. Alphin, Civil Action No. K-84-2288).

11. In the Answer by Alphin Aircraft, Inc. to the penalty action, we asserted that the government "willfully and deliberately delayed bringing this

action, as a result of which evidence crucial to the Defendant's defense has been destroyed or irrevocably lost" (Answer, Second Defense), that the action was brought by the government to penalize Alphin Aircraft for initiating litigation against the Federal Aviation Administration for illegal investigations (Answer, Third Defense), that the action was brought in violation of the Administrative Procedure Act (Answer, Fourth Defense), and that the action was barred by Rule 13(a) since it should have been brought as a compulsory counterclaim to Alphin Aircraft's pending claims in Alphin, et al. v. FAA, et al., Case No. HAR-82-553 (Answer, Fifth Defense). This case is scheduled for trial on February 25, 1985, before Chief Judge Kaufman.

12. I filed a similar answer in the penalty case initiated against me, but

also asserted that the action against me was barred by the five year statute of limitations. After the court directed the government to respond to this defense, the government sought to dismiss its filing against me without prejudice. The issue of whether that dismissal should be with prejudice or without prejudice is still open (United States of America v. Thurman S. Alphin, Civil No. K-84-2288).

13. The Court has not yet scheduled our trial in the Privacy Act case, Alphin, et al. v. FAA, et al. However, Magistrate Klein scheduled December 15, 1984 as a discovery cut-off date, and announced at a hearing in November he wishes to schedule the trial for the spring of 1985.

14. The summons issued by the Internal Revenue Service schedules production of

documents during the same period that my counsel and I had scheduled depositions and trial preparation in this exhaustive litigation with the Federal government. The items requested may possibly include numerous documents pertaining to the litigation against the government and documents prepared by or for my counsel in preparation for this litigation, and includes items privileged as work product. The years being investigated coincide precisely with the years of our litigation with the federal government.

15. According to my tax counsel, an investigation by the Central Intelligence Division of the Internal Revenue Service is a criminal investigation and is hardly ever conducted without a civil audit preceeding it. Yet, neither Alphin Aircraft nor myself personally have been subjected to such a civil audit for the years requested.

16. In view of the lack of any prior investigation and in view of the history of litigation between the United States of America and myself and Alphin Aircraft, I believe the sole prupose of the Internal Revenue Service in seeking the summoned information is to distract my attention and corporate attention from that litigation, and to bolster the campaign of harassment to my assets and my reputation that the Federal Aviation Administration initiated five years ago. I have no knowledge of any illegal activity or wrongdoing on my part that would otherwise warrant this kind of an investigation.

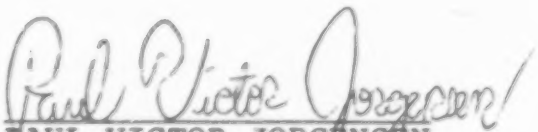
I declare under penalty of perjury that the aforegoing is true and correct.

Executed this 17th day of December, 1984.

/s/ Thurman S. Alphin

Certificate of Service

I HEREBY CERTIFY that on this Tenth day of February, 1987, I served three copies of the foregoing Petition for Writ of Certiorari by first class United States mail, postage prepaid, on the Solicitor General for the United States, Department of Justice, Washington, D.C. 20530.



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